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Supreme Court, U.S.
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No. 98-476

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

ARTHUR CALDERON, Warden, California State Prison at San Quentin
Petitioner,

vs.

ALFRED R. DYER,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

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Pursuant to United States Supreme Court Rule 39, Respondent Alfred R. Dyer ("Respondent") hereby respectfully seeks leave to file his Brief in Opposition to the instant Petition for Writ of Certiorari without prepayment of costs, and to proceed in this matter *in forma pauperis*.

Respondent is an inmate in the California State Prison at San Quentin. In an Order filed on September 20, 1989, the United States District Court for the Northern District of California granted Respondent's request to proceed *in forma pauperis* with respect to his Petition for Writ of Habeas Corpus, sought pursuant to 28 U.S.C. § 2254. Pursuant to Federal Rule of Appellate Procedure 24(a), Respondent proceeded *in forma pauperis* with respect to his appeal to the United States Court of Appeals for the Ninth Circuit of the district court's denial of his habeas petition.

Counsel of Record, Jon B. Streeter, was appointed by the Ninth Circuit as counsel for Respondent on March 15, 1995, pursuant to 21 U.S.C. § 848(q). W. Reece Bader and Shelley J. Sandusky were appointed as co-counsel, pursuant to 21 U.S.C. § 848(q), on October 21, 1997.

Dated: October 22, 1998.

Respectfully submitted,

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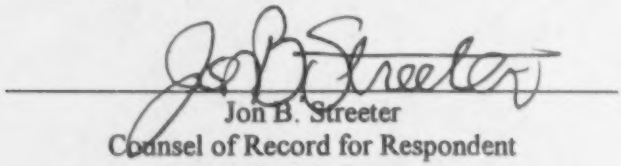

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the federal court on habeas corpus properly found that the presumption of correctness in former 28 U.S.C. § 2254(d) does not apply to state court findings of fact when the state court record pertaining to allegations of juror bias is inadequately developed, regardless of whether the failure to investigate and develop this evidence is attributable to the trial court, the prosecutor, or defense counsel.

2. Whether application of the implied bias doctrine in exceptional circumstances, where the court's confidence in a juror's impartiality is fatally undermined, constitutes a new rule under *Teague v. Lane*, 489 U.S. 288 (1989).

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I. OPINION BELOW

The en banc opinion of the Court of Appeals (App. A at 1-57) is reported at 151 F.3d 970 (9th Cir. 1998).

II. RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The **Sixth Amendment to the United States Constitution** provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .; and to have the Assistance of Counsel for his defence.

Former 28 U.S.C. § 2254(d) (1994) provided, in pertinent part:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit – . . .
>
> > (3) that the material facts were not adequately developed at the State court hearing;
> >
> > . . . .
>
> And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

This statute was amended in 1996, and the corresponding provisions were included in **28 U.S.C. § 2254(e)**, which now provides in pertinent part as follows:

> (1) In a proceeding instituted by an application for a writ of habeas corpus by a

person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

III. STATEMENT OF THE CASE

During the voir dire for respondent Alfred R. Dyer's capital murder trial, prospective juror Jez Freeland was asked whether she or any of her relatives or close friends had ever been (1) the victim of any type of crime, or (2) accused of any offense other than traffic cases. ER 85 (questions 13 and 15). Freeland answered "No" to both of these questions. ER 117.[1]

Between the guilt and penalty phases of Dyer's trial, Dyer encountered Freeland's husband, Melvin Provost, in a holding cell in the courthouse jail. ER 271-272. Provost told Dyer that Freeland's brother "was killed anywhere between five to ten years ago in a drug-related incident, and that [Freeland] had expressed strong views about that event and the circumstances surrounding it." ER 271.

Dyer's trial counsel brought this information to the trial court's attention, and requested that the trial court bring Provost in to testify. RT 2695. The court declined, and instead instructed the prosecutor to conduct an investigation into the facts reported by Dyer. RT 2695-96. That evening, Dyer's co-counsel, Robert Cross, interviewed Provost. ER 276. Provost confirmed that he was Freeland's estranged husband, and that Freeland's brother, Richard, "had

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[1] Freeland was the very last prospective juror questioned in the general voir dire, during which 75 jurors testified over the course of five days. ER 117-119. The trial judge instructed the potential jurors to "[m]ake sure that while this process is going on that you hear every question that is asked and every answer that is given. . . . [Y]ou have a right to hear, and a duty to hear. So make sure that you do." ER 84. In response to questions 13 and 15, many other prospective jurors revealed crimes in which they or their family members had been involved, including burglaries and drug-related incidents. *See* App. A. at 21.

met an unnatural death approximately four years ago," resulting in some criminal proceedings. ER 276. After Cross told the court this information, prosecutor Curtis admitted that he had been responsible for the prosecution of Richard's killer, who pled guilty to voluntary manslaughter. ER 277. Curtis produced the criminal case file regarding Richard Freeland's homicide to the trial court, and the court called Freeland into chambers for an *in camera* hearing. ER 278.

At this hearing, Freeland admitted that Richard had been the victim of a homicide, but claimed to believe that the killing was an accident. ER 279-280. She expressly disclaimed knowledge of any legal actions taken against her brother's killer, and explicitly denied that anyone from her family ever testified in court. ER 280-281. Based solely on Freeland's claim that she thought that Richard's killing had been an accident and that she could be fair, the trial court concluded that Freeland had not demonstrated "any lack of candor," and refused to grant Dyer's motion for a mistrial. ER 283-284. In denying this motion, the Court relied on the fact that "[t]here's no foundation establishing how well she knew the brother. We have brothers and we have brothers." ER 284. The trial court also denied Dyer's later motion for new trial, without hearing any testimony on the issue of juror bias. ER 338-358.

Crucial and indispensable facts relating to Freeland's credibility and impartiality were not developed in the state trial court. Most significant, given the trial court's emphasis on the importance of Freeland's relationship with her brother, is Freeland's post-trial acknowledgment that she was in fact very close to Richard, that she and Richard were both teenagers living with their mother at the time of the killing, and that Richard's death "was a painful time in our lives." ER 800-801, 1507-1508, 1511, 1532. In addition, the trial court never knew that Richard

Freeland had been pistol-whipped before he was shot by his assailant (ER 1791)[2]; Freeland's mother, with whom she lived at the time, was present at the crime scene shortly after Richard's shooting, and testified at the preliminary hearing relating to the murder charge filed against Richard's killer (ER 1794, 1795-98, 1800); and Freeland had been a plaintiff, and her family had recovered $15,000, in a wrongful death action against Richard's killer (ER 1809-10, 1834).

The trial court also never learned that, contrary to Freeland's voir dire testimony, she had been the victim of numerous crimes herself, and that many of her close relatives had been accused of serious felonies. In fact, Freeland had been sexually assaulted at knifepoint by her cousin (ER 1539-42, 1544); Freeland and her siblings were kidnapped when they were children by their father, who was arrested for the offense (ER 1543-44); Freeland's family home and several of her cars had been burglarized many times (ER 1532-33, 1539, 1544-48); Freeland's brother, Billy, was arrested for drug offenses one month before Freeland gave her voir dire testimony, and had been convicted of possession of brass knuckles (ER 1843, 1915-1919); Freeland's estranged husband was arrested for rape one month before Freeland's voir dire (ER 1874, 1907); and Freeland's uncle Jason Caldwell was arrested for murder in 1970 and pled guilty to armed robbery in 1979, and Caldwell stayed with Freeland and her family, and was paroled to Oakland from Louisiana in 1981 (ER 1515-16, 1526-27, 1812-1820, 1905).

In the deposition of Freeland taken in connection with Dyer's federal habeas proceedings, Freeland revealed her belief that she – and not the court or the lawyers – was the best and only judge of what information was relevant. Freeland testified (1) that she would "answer questions

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[2] At trial, the State argued that Dyer pistol-whipped one of the victims. ER 366.

PUBLISHER'S NOTE:

Page number(s) 5 could not be located.

attached a presumption of correctness to the state court findings on this issue. App. D at 312.[4]

The en banc panel reversed the district court on the issue of juror bias, concluding (1) the state court record was inadequately developed and therefore the presumption of correctness does not attach to the state court findings; and (2) Juror Freeland must be presumed biased under the unique circumstances presented in this case.

IV. REASONS FOR DENYING THE WRIT

This case involves a bizarre and extraordinary set of factual circumstances revolving around a juror who "lied, and lied repeatedly" (App. A at 24) about her own and her family's extensive involvement with the criminal justice system, and whose lack of impartiality deprived Dyer of his right to a fair trial. Given the unique and complex set of facts that informed the en banc panel's decision in this case, it is perhaps not surprising that Petitioner has been unable to articulate the required "compelling" reasons for this Court to grant certiorari. Instead, Petitioner merely re-argues the merits of his case, arguments that the court of appeals sitting en banc has already rejected.

Petitioner's claim that the en banc panel improperly declined to afford a presumption of correctness to state court fact-findings on juror bias is not only legally unsupportable, but also based on a statute – the former 28 U.S.C. § 2254(d) – that has since been superseded. Upon

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[4] The district court itself never had the opportunity to observe Freeland's demeanor in assessing her credibility. Freeland refused to allow her deposition to be videotaped (ER 920), and evaded Dyer's counsel's 21 attempts over a two-week period to serve her with a subpoena to appear at the evidentiary hearing, despite the fact that she was in the area during this period (ER 767-792, 798-799). Thus, no court has observed Freeland's demeanor when confronted with all of her voir dire omissions.

concluding that the state court record was not adequately developed, the en banc panel correctly declined to afford the presumption to state court findings regarding Juror Freeland's impartiality. In doing so, the panel merely followed the explicit provisions of former section 2254(d)(3), and did not, as Petitioner alleges, impose any "new duty" on state courts to develop the record.

Petitioner's argument that *Teague v. Lane*, 489 U.S. 288 (1989), precludes the en banc panel's application of the doctrine of implied bias to the extraordinary facts in this case is also without merit. To the contrary, it is a long-standing, well-accepted and basic principle that in certain exceptional circumstances – like those presented in this case – a juror's bias must be presumed.

For these reasons, and as discussed below, this case does not merit review by this Court, and the petition should be denied.

A. The Court of Appeals' Interpretation of Former 28 U.S.C. § 2254 Does Not Impose a New Duty on State Trial Judges to Investigate Juror Bias, Nor Does the Court of Appeals' Interpretation of that Superseded Statute Merit Consideration by this Court

Under former 28 U.S.C. § 2254(d),[5] a presumption of correctness attached to state court findings of fact in federal habeas corpus proceedings. The § 2254(d) presumption did not apply, however, where the "material facts were not adequately developed at the State court hearing."

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[5] Though 28 U.S.C. § 2254(d) was superseded in 1996 by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), the former § 2254(d) applies in this case, because the AEDPA does not apply retroactively to Dyer's appeal. *See Lindh v. Murphy*, 521 U.S. 320 (1997). Petitioner has conceded that Chapter 154 of the AEDPA cannot apply to Dyer because his direct appeal was decided by the California Supreme Court prior to 1989. *Ashmus v. Calderon*, 123 F.3d 1199, 1202 n. 1 (9th Cir. 1997), *rev'd on other grounds, Calderon v. Ashmus*, 118 S. Ct. 1694 (1998).

28 U.S.C. § 2254(d)(3) (1994). Relying on this exception, the en banc panel concluded that the record with respect to juror Jez Freeland's bias was not adequately developed, and that the presumption of correctness therefore did not apply to the state court's finding that Freeland was unbiased. App. A at 18.[6]

Petitioner makes much of the fact that in determining that the record was not adequately developed, the en banc panel attributed this failure largely to inaction on the part of the state trial court. Although Petitioner attaches great importance to who was to blame for the inadequate development of the state court record, that inquiry is simply not relevant. Former section 2254(d)(3) only required a conclusion *that the record was not adequately developed*; it was not concerned with *why* the record was not adequately developed.

The en banc panel found, as required by former section 2254(d)(3), that the state court record was inadequately developed. It properly based this conclusion on the existence of numerous material facts readily available to – but not discovered by – the trial court, which would have made a difference in the trial court's determination of whether Freeland was an impartial juror. Thus, despite Petitioner's hyperbolic claims of a new burden on the trial court, and "eviscerat[ion]" and "nullifi[cation]" of the presumption of correctness, the en banc panel merely followed the former statute. Because the decision below was a plainly correct application of settled law, and no conflict among the circuits is even alleged by Petitioner, this issue does not

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[6] Dyer alternatively argued below that even if the presumption of correctness applied to the state court's factual findings, Dyer had established by convincing evidence that the state court's factual determination regarding Freeland's impartiality was erroneous (*see* App. A at 35-36, Brunetti, J., dissenting), as required by former 28 U.S.C. § 2254(d). Because it found the presumption of correctness inapplicable, the en banc panel did not need to decide this contention.

merit review by this Court.

1. **Former 28 U.S.C. § 2254(d)(3), by its plain terms, did not address who was at fault for an inadequately developed record.**

Former 28 U.S.C. § 2254(d) set forth eight circumstances in which the presumption of correctness would not attach to state court findings of fact, including cases in which "the material facts were not adequately developed at the State court hearing." *See* former 28 U.S.C. § 2254(d)(3) (1994). The statute stated plainly that if any of the eight exceptions were met, *the presumption did not apply*. Former section 2254(d)(3) did *not* require an inquiry into why the record was inadequately developed, or who was to blame.

Petitioner complains about the court of appeals' criticism of the hearing and investigation conducted by the state trial court into the issue of Juror Freeland's bias.[7] But by focussing on *who* was considered by the court of appeals to be responsible for the inadequately developed state court record, Petitioner improperly confuses the requirements for attachment of a presumption of correctness under former section 2254(d) with the cause and prejudice standard applied to the question of whether a hearing is required under *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). *See id.* at 10 n. 5 ("Section 2254(d) . . . does not purport to govern the question of

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[7] Petitioner claims that Dyer never asserted that the trial court should have developed the record relating to Freeland's bias, and that Dyer raised as an issue only his trial counsel's inadequate performance in developing that record. Cert. Pet. at 8, 12-13. Petitioner's argument misstates Dyer's position. In fact, Dyer has *consistently* asserted that the material facts were not developed in the state court, that the presumption of correctness therefore did not apply pursuant to former section 2254(d)(3), and that Dyer's Sixth Amendment right to trial by an impartial jury was violated. Moreover, as discussed above, Petitioner's argument misses the point, because who was at fault for the inadequate development of the record under former section 2254(d)(3) was not relevant.

when hearings are required; rather, it lists exceptions to the normal presumption of correctness of state-court findings and deals with the burden of proof where hearings are held. The two issues are distinct . . . .").[8] Regardless of why the record was inadequately developed, the en banc panel acted properly, once it made that determination, in declining to apply the presumption of correctness to the state court findings that Freeland was an unbiased juror.

2. The court of appeals properly found that the record was not adequately developed.

Petitioner claims that the en banc panel, in setting aside the presumption of correctness under the unique factual circumstances of this case, imposes some new onerous burden on state trial courts investigating claims of juror bias. This is wrong. By pointing out the inadequacies of the state trial court's fact-finding procedure, the court of appeals was merely making the required determination that the record was inadequately developed, not imposing a new duty on trial courts.

Significantly, Petitioner does not even dispute the facts supporting the en banc panel's

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[8] In seeking to defend the fact findings of the state trial court, Petitioner argues that trial counsel, rather than the court, was to blame for the inadequately developed record. *See* Cert. Pet. at 10-11. Even if Petitioner were correct that a cause and prejudice standard applies to the exceptions to the presumption of correctness– which it clearly does not – "cause" for the failure to adequately develop the record is attributable to the State. Exacerbating the trial court's failure to adequately develop the record was the prosecutor's silence in the face of Freeland's claim that her brother's killing was an accident and denial that her family was involved in court proceedings against the killer. Though facts in the case file (including the fact that Richard Freeland was pistol-whipped before being shot in the back of the head, and that Freeland's mother testified at the preliminary hearing on the murder charge brought against Richard's killer) made Freeland's claims implausible, the prosecutor failed to present this information to either the trial court or defense counsel. Moreover, the ineffectiveness of Dyer's trial counsel, as alleged by Petitioner, would also constitute "cause" for failure to adequately develop the record. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986).

conclusion that the state court record on juror bias was inadequately developed. Petitioner concedes that Freeland failed to reveal during voir dire "that she was once attacked with a knife by a young cousin; that her father had been arrested for kidnapping his children; that her brother and uncle had been accused of crimes; that her family home had been burglarized on multiple occasions; and that Provost, her former husband,[9] had been arrested for rape." Cert. Pet. at 6.

Petitioner further concedes that Freeland "lived at home and was close to her brother at the time he was killed; that his death caused the family pain; that her mother had testified in the preliminary hearing of the man charged with killing Richard Freeland; and that her family had filed a wrongful death action which resulted in a $15,000 settlement." *Id.*

The trial court never learned that Freeland was very close to her brother, and that her family had been involved in both criminal and civil suits against his killer. Nor did the trial court learn that Freeland had been the victim of numerous crimes herself, and that many of her close relatives had been accused of serious felonies. Faced only with Freeland's denial on voir dire that she or any of her family members had been victims of, or accused of, any crimes, and her claimed belief that Richard's killing was an accident, the trial court concluded that Freeland's responses showed no "lack of candor" and denied Dyer's motion for a mistrial (ER 283-84).

In considering whether these facts, which were not before the trial court, established an inadequate development of the record under former section 2254(d)(3), the court of appeals recognized that:

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[9] Contrary to Petitioner's assertion, Freeland was still married to – though separated from – Provost at the time of her voir dire. ER 79. She even answered questions on voir dire when addressed as "Mrs. Provost." ER 80.

> To warrant setting aside the presumption of correctness, facts left undeveloped by the state court must be "material," *see* 28 U.S.C. § 2254(d)(3), not trivial or tangential to the issue presented. Indeed, something more than the usual meaning of "material" seems to be required: The missing facts must be "crucial," "vital" or "indispensable to a fair, rounded, development of the material facts."

App. A at 12. Looking to the extraordinary facts discovered by Dyer post-trial, the en banc court correctly found a material possibility that the trial court would have reached a different conclusion concerning Freeland's credibility had it been evaluating her responses and demeanor on a fully developed record. *Id.*[10] Under such circumstances, the state court findings are not entitled to the presumption of correctness.

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[10] Petitioner accuses the en banc panel of making factual findings "wholly inconsistent with the record developed in both the state and federal courts." Cert. Pet. at 11, n. 4 and accompanying text. But the "examples" of this cited by Petitioner belie his assertion. First, for reasons that remain unclear, Petitioner persists in attaching importance to the fact that Freeland was originally assigned to the jury as an alternate. Petitioner does not cite any authority, nor can he, for the proposition that an alternate juror need not be impartial. And just as importantly, Juror Freeland became a regular juror *before* the conclusion of the guilt phase of the trial (RT 2005-2006), and thus participated as a full-fledged juror in both the guilt and penalty phase deliberations. Second, contrary to Petitioner's assertion, the report from defense counsel about his meeting with Provost actually *corroborated* what Dyer had reported, and suggested that "proceedings" *had been brought* against Richard's killer (inconsistent with *both* Freeland's claims that the shooting was an accident, and that no proceedings had been brought against the killer). *See* App. A at 14, ER 276. Third, Petitioner notes that Freeland's father testified that he doubted ever having discussed with Freeland the wrongful death suit his family brought against Richard's killer. But Petitioner fails to acknowledge that Freeland's father *also* testified that his children were unhappy that he kept the settlement money himself (ER 804), proof that Freeland knew about the lawsuit. Finally, Petitioner claims that the en banc panel's disbelief that Freeland was unaware of the details surrounding Richard's killing was "based solely" on a magazine article. This argument could not be farther from the truth. In fact, the panel based its disbelief on the undisputed facts that when Richard was killed, he and Freeland lived at home with their mother, Freeland's mother testified at the preliminary hearing on the murder charge against Richard's killer, Freeland knew her brother had been shot and killed after a fight, Freeland was very close to her brother, Freeland's family sued Richard's killer for wrongful death, and no one in Freeland's family suggested that Richard's killing was an accident. *See* App. A. at 6, 9-10, 20.

3. The en banc panel did not create a "new duty" requiring state courts to investigate juror bias.

Petitioner attempts to turn the en banc panel's observations about the trial court's failure to inadequately develop the state court record into a "new duty" imposed on all state courts to investigate juror bias. This argument is baseless. Trial courts have long taken it upon themselves to conduct such factual inquiries, and appeals courts have long taken trial courts to task for any failures to do so. *See Remmer v. United States*, 347 U.S. 227, 229-30 (1954) (trial court evaluating incident raising question as to juror impartiality should "determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial"); *United States v. Gaston-Brito*, 64 F.3d 11, 12 (1st Cir. 1995) ("When a non-frivolous suggestion is made that a jury may be biased or tainted by some incident, the district court must undertake an adequate inquiry to determine whether the alleged incident occurred and if so, whether it was prejudicial"). Indeed, the California Supreme Court expressly recognizes the judicial inquiry that Petitioner claims is "unfair" to impose on state courts. *See, e.g., People v. Burgener*, 41 Cal. 3d 505, 520 (1986) ("once the court is put on notice of the possibility that a juror is subject to improper influences it is the court's duty to make whatever inquiry is reasonably necessary to determine if the juror should be discharged").

In this case, as the en banc panel recognized, the trial court was not presented with mere baseless allegations of misconduct, but rather it became aware of concrete, corroborated information raising serious questions about Juror Freeland's impartiality. App. A at 8-18. It is hardly a "new" concept that a trial court, when faced with this information, should reasonably follow up by reviewing materials (such as the criminal case file) made available to it.

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4. The court of appeals' interpretation of former 2254(d)(3) has diminished significance in light of the AEDPA

Not only does Petitioner complain about a decision that was plainly correct under well-settled law (with respect to which there is no conflict among the circuits), but the statute relied on by Petitioner has been superseded by the AEDPA. *See* 28 U.S.C. § 2254(e)(1). The new section 2254(e)(1), while retaining the presumption of correctness of state court findings afforded by former section 2254(d), no longer enumerates specific exceptions to this presumption.

In the absence of these enumerated exceptions, it remains to be seen under what circumstances courts will conclude that the presumption of correctness has been rebutted or does not apply. Nevertheless, in light of the statutory changes made by the AEDPA, it is clear at a minimum that resolution by this Court of Petitioner's complaints about the court of appeals' application of former section 2254(d)(3) will have diminished significance for future habeas cases. Thus, this issue does not merit consideration by this Court.

B. The Court of Appeals' Determination that Bias Is Implied Under the Exceptional Circumstances of this Case Does Not Constitute a New Rule in Violation of *Teague v. Lane*

In an effort to make this case appear worthy of certiorari review, Petitioner grossly overstates the holding of the court of appeals. According to Petitioner, the en banc panel ruled that "bias should be implied when a juror withholds information during voir dire." Cert. Pet. at 9. In fact, the court rendered an extremely narrow decision, implying bias in the exceptional circumstances of this case – where "the magnitude of Freeland's lies and her remarkable display of insouciance . . . fatally undermine[d the court of appeals'] confidence in her ability to fairly decide Dyer's fate." App. A at 30.

Petitioner contends that by applying the doctrine of implied bias in this case the court of appeals violated *Teague v. Lane*, 489 U.S. 288 (1989). But there is nothing "new" about implied bias. Because the rule of implied bias is so well-recognized, so rooted in due process, it has been taken for granted for centuries. The list of venerable authorities confirming its long history can be traced from *Dr. Bonham's Case*, 77 Eng. Rep. 646, 652 (C.P. 1610) (Coke, J.), to *United States v. Burr*, 25 F. Cas. 49, 50 (D. Va. 1807) (Marshall, C.J.), to *Clark v. United States*, 289 U.S. 1, 11 (1933) (Cardozo, J.). This Court explicitly recognized the doctrine in *United States v. Wood*, 299 U.S. 123, 133 (1936) ("[t]he bias of a prospective juror may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as matter of law"), and applied it in *Leonard v. United States*, 378 U.S. 544 (1964) (per curiam) (juror who serves in one case presumed biased in another case involving same facts but different defendant).

A number of cases in this Court and in the lower federal courts decline to apply the doctrine of implied bias in specific factual settings.[11] But no decision has ever stated that the doctrine does not exist. Quite to the contrary, the precedent among the circuits recognizing that implied bias may be invoked in limited circumstances has been broad, deep and unanimous for many years.[12] Such a wide-ranging consensus is not surprising on a "process integrity" point of

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[11] *See, e.g., Chandler v. Florida*, 449 U.S. 560 (1981); *Remmer v. United States*, 347 U.S. 227 (1954); *Dennis v. United States*, 339 U.S. 162 (1950). *See, also e.g., Fitzgerald v. Greene*, 150 F.3d 357 (4th Cir. 1998); *Tinsley v. Borg*, 895 F.2d 520, 527 (9th Cir. 1990), *cert. denied*, 498 U.S. 1091 (1991); *United States v. Malloy*, 758 F.2d 979 (4th Cir. 1985), *cert. denied*, 474 U.S. 1009 (1985); *Irons v. Lockhart*, 741 F.2d 207 (8th Cir. 1984), *cert. denied*, 469 U.S. 1220 (1985); *Rogers v. McMullen*, 673 F.2d 1185 (11th Cir. 1982), *cert. denied*, 459 U.S. 1110 (1983); *United States v. Whiting*, 538 F.2d 220 (8th Cir. 1976).

[12] *See Amirault v. Fair*, 968 F.2d 1404, 1405-06 (1st Cir. 1992), *cert. denied*, 506 U.S. 1000 (1992); *United States v. Haynes*, 398 F.2d 980, 984 (2nd Cir. 1968), *cert. denied*, 393 U.S. 1120

such fundamental importance. As Judge Kozinski pointed out for the en banc majority, the doctrine of implied juror bias is but a specific application of the more general due process principle that bias may be presumed conclusively from circumstantial evidence that a judicial decisionmaker is subject to improper influences, despite subjective protestations of impartiality. *See* App. A at. 31-32, citing *Tumey v. Ohio*, 273 U.S. 510, 532 (1927) (judicial bias presumed where judge had economic interest in outcome of decisions).

Petitioner relies heavily on a suggestion by the dissenters in *Smith v. Phillips*, 455 U.S. 209 (1982) that implied bias might have been abolished by *Smith*. This "doomsday" scenario has never come to pass: only three courts have ever suggested that there might be any question about the viability of implied bias under this Court's cases,[13] and none has ever taken that idea seriously enough to rule that implied bias was in fact eliminated by *Smith v. Phillips*. Indeed, in *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548 (1984), a majority of this Court assumed that the doctrine exists. In the end, there may be room for argument about when and

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footnote continued

(1969); *United States v. Torres*, 128 F.3d 38, 45 (2nd Cir. 1997) *cert. denied by Rivera v. U.S.*, 118 S.Ct. 1399 (1998); *United States ex rel. De Vita v. McCorkle*, 248 F.2d 1, 8 (3rd Cir. 1957), *cert. denied*, 355 U.S. 873 (1957); *Person v. Miller*, 854 F.2d 656, 664 (4th Cir. 1988), *cert. denied*, 489 U.S. 1011 (1989); *United States v. Scott*, 854 F.2d 697, 699 (5th Cir. 1988); *McCoy v. Goldston*, 652 F.2d 654, 659 (6th Cir. 1981); *United States v. Frost*, 125 F.3d 346, 379 (6th Cir. 1997), *cert. denied*, __U.S. __ ,1998 WL 130828 (Oct. 5 1998); *Hunley v. Godinez*, 975 F.2d 316, 318-19 (7th Cir. 1992); *Johnson v. Armentrout*, 961 F.2d 748, 755 (8th Cir. 1992); *United States v. Eubanks*, 591 F.2d 513, 517 (9th Cir. 1979); *Burton v. Johnson*, 948 F.2d 1150, 1158 (10th Cir. 1991), *cert. denied*, 507 U.S. 1043 (1993); *United States v. Perkins*, 748 F.2d 1519, 1532 (11th Cir. 1984); *Jackson v. United States*, 395 F.2d 615, 618 (D.C. Cir. 1968).

[13] Even these courts do so only obliquely. *See Tinsley v. Borg*, 895 F.2d 520, 527 (9th Cir. 1990) ("The Supreme Court has never *explicitly* adopted or rejected the doctrine of implied bias") (emphasis added); *Fitzgerald*, 150 F.3d at 365 (same); *Miller*, 854 F. 2d at 664.

under what circumstances the doctrine applies in a given case, but the question of its existence *vel non* is simply not open to genuine debate. If there is any doubt about whether a reasonable state court jurist would agree, there is no need to speculate. No state court has ever ruled that the implied bias doctrine does not exist, and twenty-seven states – including California – expressly recognize it in case law or by statute.[14]

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[14] *See Ex parte Nettles*, 435 So. 2d 151, 153 (Ala. 1983); *Linell v. State*, 671 S.W.2d 741, 742 (Ark. 1984) *cert. denied by Linell v. Arkansas*, 470 U.S. 1062 (1985); *Isom v. State*, 655 S.W.2d 405 (Ark. 1983); *In re Hitchings*, 6 Cal. 4th 97, 120 (1993); *People v. Moya*, 899 P.2d 212, 215 (Colo. Ct. App. 1994); *Safeway Stores, Inc. v. Langdon*, 532 P.2d 337, 338 (Colo. 1975); *State v. Kauhi*, 948 P.2d 1036, 1039 (Haw. 1997); *State v. Bowman*, 866 P.2d 193, 198 (Idaho Ct. App. 1993); *State v. Major*, 665 P.2d 703, 706 (Idaho 1983); *Harris v. State*, 659 N.E.2d 522, 526(Ind. 1995); *Woolston v. State*, 453 N.E.2d 965, 967 (Ind. 1983); *State v. Stuart*, 476 P.2d 975, 978 (Kan. 1970); *Sholler v. Commonwealth*, 969 S.W.2d 706, 708 (Ky. 1998); *Pennington v. Commmonwealth*, 316 S.W.2d 221, 223 (Ky. 1958); *State v. Sexton*, 477 So. 2d 124, 127 (La. Ct. App. 1985); *Brownell v. Brown*, 319 N.W.2d 664, 667 (Mich. Ct. App. 1982); *Rosenthal v. Kolars*, 231 N.W.2d 285, 287 (Minn. 1975); *Alvarez v. State*, 582 P.2d 816, 818 (N.M. 1978); *People v. Ruiz*, 482 N.Y.S.2d 665, 667 (1984); *State v. Buckom*, 485 S.E.2d 319, 326 (N.C. Ct. App. 1997) *cert. denied by Buckom v. State of N.C.*, 118 S. Ct. 425 (1997) ; *State v. Smaage*, 547 N.W.2d 916, 919 (N.D. 1996); *State v. Rummel*, 326 N.W.2d 64, 65 (N.D. 1982); *State v. Williams*, 679 N.E.2d 646, 663 (Ohio 1997); *Spears v. State*, 924 P.2d 778, 781 (Okla. Crim. App. 1996); *Smith v. State*, 651 P.2d 1067, 1069 (Okla. Crim. App. 1982); *State v. Rogers*, 836 P.2d 1308, 1316 (Or. 1992) *cert. denied by Rogers v. Oregon*, 507 U.S. 974 (1993); *State v. Bittner*, 359 N.W.2d 121, 127 (S.D. 1984); *State v. Akins*, 867 S.W.2d 350, 354 (Tenn. Crim. App. 1993); *Kirkland v. State*, 786 S.W.2d 557, 560 (Tex. Ct. App. 1990); *State v. Percy*, 595 A.2d 248, 253 (Vt. 1990) *cert. denied by Percy v. Vermont*, 502 U.S. 927 (1991); *Carle v. McChord Credit Union*, 827 P.2d 1070, 1081 (Wash. Ct. App. 1992); *State v. Gosser*, 656 P.2d 514, 517 (Wash. Ct. App. 1982); *State v. Wade*, 490 S.E.2d 724, 728 (W. Va. 1997), *cert. denied* 118 S. Ct. 576 (1997); *State v. Olson*, 508 N.W.2d 616, 618 (Wis. Ct. App. 1993); *State v. Gesch*, 482 N.W.2d 99, 100 (Wis. 1992); *Redwine v. Fitzhugh*, 329 P.2d 257, 260 (Wyo. 1958). *See Gilmore v. Taylor*, 508 U.S. 333, 344 n.3 (1993) ("The existence of . . . an institutionalized state practice over a period of years is strong evidence of the reasonableness of the interpretations given existing precedent by state courts"). California's recognition of implied bias has particular relevance, given *Teague*'s concern with validating "reasonable, good faith interpretations of precedent by state courts" (Cert. Pet. at 15). Since California courts operate under a rule of implied bias, they can hardly be deemed to have been unfairly surprised by a federal court following the same rule.

As Judge Kozinski pointed out for the majority below, this case is "the antithesis of *Teague* – a rule so deeply embedded in the fabric of due process that everyone takes it for granted." App. A at 31. In order to validate state courts' reasonable, good faith determinations of existing law on direct appeal, *Teague* bars application on collateral review of "new" rules (*i.e.* rules not dictated by "existing precedent" at the time the conviction subject to collateral attack became final). Nothing about implied bias would have been "new" in this or any other sense as of October 31, 1988, the date Dyer's convictions became final on direct appeal. Because the doctrine of implied bias "may indeed be the single *oldest* rule in the history of judicial review" (App. A at 31), *Teague* simply does not come into play. The abundant state court authority recognizing implied bias before and after *Smith v. Phillips* is powerful evidence that all reasonable state court jurists would have felt compelled to recognize the doctrine at that time.

Petitioner argues that any rule that is not the subject of a Supreme Court opinion affirmatively and unequivocally announcing it as a constitutional imperative binding on the states must be new.[15] *Stringer v. Black*, 503 U.S. 222 (1989), is to the contrary. *See id.* at 235 (rule urged by habeas petitioner was "so evident" from prior precedent that the Court "took [it] for granted" in later case). Moreover, "existing precedent" under *Teague* is not limited to Supreme Court cases. Because this Court does not and cannot address every constitutional issue, state courts often must rely on other sources of precedent in constitutional adjudication. Given this reality, a rule that finds its authority in hundreds of years of precedent – based on common

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[15] *See* Cert. Pet. at 18 (Supreme Court must have "expressly articulated a rule"); *id.* (Supreme Court must have "announced [a] rule as a constitutional imperative binding on state courts); *id.* (Supreme Court must have provided "affirmative precedent").

law, lower federal court cases, and at least implicitly decisions of this Court – cannot be considered "new" under *Teague* simply because this Court has never felt the need to endorse it explicitly. If anything, that is an indication of how well-entrenched the rule is, not its novelty.

C. A Number of Issues Were Left Undecided by the En Banc Panel

Because the court of appeals concluded that the extraordinary facts in this case merited application of implied bias, it did not remand to the district court for a hearing on the question of actual bias. Additionally, while Dyer petitioned for rehearing en banc on several issues, and the en banc panel did not limit its grant of the rehearing petition to any particular issue, the panel limited its order granting relief to the issue of juror misconduct. Other issues that therefore remain to be decided by the en banc panel are as follows: (1) the three judge panel's erroneous refusal to remand for an evidentiary hearing at which juror Freeland's credibility could be assessed; (2) the three judge panel's erroneous analysis of an ex parte statement to the jurors by one of the victims that Dyer should be executed; (3) the three judge panel's erroneous reliance on the trial judge's subjective intent to deny a claim of *Caldwell* error; (4) the three judge panel's erroneous conclusion that an instructional error was harmless; (5) the three judge panel's erroneous conclusion that Dyer was not denied effective assistance of counsel; and (6) the three judge panel's failure to apply the Ninth Circuit's standard for assessing cumulative error.

Even if this Court were to reverse the court of appeals' decision, the case must be remanded to the en banc panel so that it may decide these remaining issues.

V. CONCLUSION

This case does not merit review by this Court. For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Dated: October 22, 1998.

Respectfully submitted,

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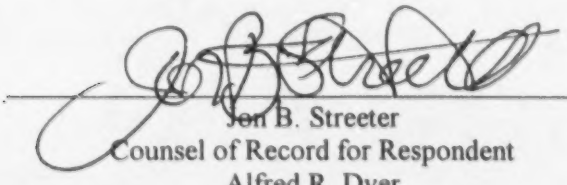

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United States Supreme Court
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Re: Calderon v. Dyer - No. 98-476

Dear Sir or Madam:

Enclosed for filing are an original and ten copies of (1) Respondent's Motion for Leave to Proceed *In Forma Pauperis,* and (2) Respondent's Brief in Opposition. Pursuant to Supreme Court Rule 15.3, a copy of the motion precedes, and is attached to, each copy of the brief. Also enclosed are an original and ten copies of a certificate of service of these documents on Petitioner's counsel.

Very truly yours,

Shelley J. Sandusky
Counsel for Respondent
Alfred R. Dyer

SJS:met
Enclosures

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